STATE OF MICHIGAN

COURT OF APPEALS

LISA MARIE CUNNINGHAM, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED February 20, 2007
v	No. 264881 Wayne Circuit Court
TRACY MICHAEL CUNNINGHAM, Defendant/Counter-Plaintiff-Appellant.	LC No. 02-202230-DM

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce. We affirm in part, reverse in part, vacate in part and remand for further proceedings consistent with this opinion.

I

Defendant challenges provisions in the divorce judgment that permit plaintiff to unilaterally change her parenting time when she believes she is able, from having each of the two children one at a time on set days, to having both children at once. Defendant does not challenge the portion of the judgment awarding plaintiff parenting time with each child separately.

Before the court entered the judgment of divorce, the parties reached a custody and parenting time agreement with the assistance of Marie Pulte, the guardian *ad litem* of the minor children. Pulte recommended in a letter to the court that:

> When [plaintiff] is again able to take the children together instead of separately, the parties share joint physical custody rotating parenting time on a week-to-week basis.
>
> * * *
>
> This temporary parenting time schedule should be reviewed every three months to monitor progress. The increased time with both children spending time with [plaintiff] can occur at any time with reasonable notice and does not have to wait for the three-month intervals.

The parties agreed to this parenting time schedule and the court incorporated it into the judgment of divorce, which provides in pertinent part:

> 2. PHYSICAL AND LEGAL CUSTODY: Both Plaintiff, LISA CUNNINGHAM, and Defendant, TRACY CUNNINGHAM, shall share joint legal custody of the parties' minor children . . . When the Plaintiff, LISA CUNNINGHAM, is able to take the children together instead of separately, the parties shall share joint physical custody, rotating parenting time on a week to week basis.
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> * * *
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> 4. PARENTING TIME: Parenting time with the parties' minor children shall include the following:
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> When Plaintiff, LISA CUNNINGHAM, is able to take the children together instead of separately, the parties shall rotate parenting time on a week to week basis. Until such time, the Plaintiff, LISA CUNNINGHAM, shall have the following specific parenting time schedule:
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> * * *
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> f. As soon as Plaintiff is able to take both children together, this parenting time should include both children on any of the above-scheduled times, with reasonable notice . . .
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> * * *
>
> h. This parenting time schedule is to be reviewed every three (3) months . . . .
>
> i. The aforementioned temporary parenting time schedule should be reviewed every three (3) months to monitor progress. The increase [sic] time with both children spending time with the Plaintiff can occur at any time with reasonable notice, and does not have to wait for the three (3) month intervals. The specifics for the changing schedule can be worked out by the parties and, if necessary the children's counselor, Marie Pulte, or a Court appointed parenting time facilitator.
>
> j. Marie Pulte, if she chooses, shall be the parenting time coordinator, and shall have the full authority of the Court to reconcile any parenting time issues . . .

Generally, parenting time is governed by MCL 722.27a, which provides, in relevant part:

> (1) Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

> (2) If the parents of a child agree on parenting time terms, the court shall order the parenting time terms unless the court determines on the record by clear and convincing evidence that the parenting time terms are not in the best interests of the child.
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> (3) A child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health.
>
> * * *
>
> (7) Parenting time shall be granted in specific terms if requested by either party at any time.

Approximately six months after defendant's motion for new trial was denied, the trial court entered a stipulated order appointing a new parenting time coordinator, Wallace Winters, to arbitrate issues regarding parenting time for 12 months. The order reflecting that the parties signed an advice of rights regarding the arbitrator/parenting time coordinator was entered after defendant filed his appellate brief. At oral argument before this Court, defense counsel argued that even though the parties stipulated to the appointment of a new parenting time coordinator, this Court should nonetheless modify the challenged judgment of divorce provisions, to reflect that plaintiff may not modify parenting time unilaterally, but rather, must file a motion to modify custody.

We remand with instructions that the trial court modify the challenged parenting time divorce judgment provisions to reflect the parties' agreement as reached with arbitrator Winters.

Relatedly, defendant argues that the trial court's appointment of Pulte as a permanent parenting time coordinator is unconstitutional and in violation of statutory authority. The court ordered that Marie Pulte, the guardian *ad litem* of the minor children, would act as the parenting coordinator, and that she would have full authority of the court to reconcile any parenting time issues. The order further stated that the parenting time coordinator would remain for six months and thereafter the court may discharge him or her.

Plaintiff argues that defendant's challenge is moot because the parties subsequently agreed to the appointment of Wallace Winters as parenting time coordinator. Plaintiff notes that Winters does not have complete authority to decide the custody or parenting time issues as that is left to the trial court in the order entered by the parties.

We agree. In light of the fact that the order appointing Pulte as a parenting time coordinator is now superceded by the stipulated order appointing Winters as a parenting time coordinator/arbitrator, defendant's argument that the court was unauthorized to appoint Pulte as a parenting time coordinator appears moot.

II

Defendant next argues the trial court's dispositional ruling regarding the real property was unfair and inequitable. Defendant argues that the property distribution was unfair and

inequitable because the trial court failed to: (1) make a determination of marital and separate property, (2) make specific findings regarding the value of the real property, (3) explain the reasons for the unequal distribution (4) consider the best interests of the children when dividing the property, and (5) recognize the substantial contributions he made to the marital home during the course of the divorce. We agree in part.

We review the findings of fact in a divorce case for clear error and then decide whether the dispositional ruling was fair and equitable in light of the facts. MCR 2.613(C); *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005). "The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Draggoo v Draggoo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997).

When dividing marital assets "the conduct of the parties during the marriage may be relevant to the distribution of property, but the trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance." *Sparks v Sparks*, 440 Mich 141, 158; 485 NW2d 893 (1992). "The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). To reach an equitable division, the trial court should consider the following: (1) the duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. *Sparks*, *supra*, p 159-160.

Before the court made its final ruling, it made several factual findings. The court found that the parties were married for about 12 years and that they equally contributed to the marriage, plaintiff by working and defendant by managing the parties' rental properties. The court found that the parties were about the same age and in good health, and that they both were educated and had the same earning ability. The court further found that defendant was at greater fault for the marital strife. Based on the court's findings, plaintiff was awarded the Riverside and Fifth Street properties and defendant was awarded the Cherry street properties, the Fourth street properties and the Dwight Street property.

When dividing property in a divorce action, the trial court's first consideration is the determination of marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). "Generally, the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate estate with no invasion by the other party. However, a spouse's separate estate can be opened for redistribution when one of two statutorily created exceptions is met." *Reeves*, *supra*, p 494. The first exception permits invasion when "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party." MCL 555.23; *Reeves*, *supra*, p 494. The second exception permits invasion when "one significantly assists in the acquisition or growth of a spouse's separate asset." MCL 552.401; *Reeves, supra*, p 495.

Defendant argues that the trial court failed to make a determination of marital and separate property. Plaintiff asserts that the trial court rendered an equitable property distribution, but concedes that the trial court's opinion is general and that defendant may be entitled to a remand for the trial court to explain its property distribution determinations.

Plaintiff was awarded the Riverside and Fifth street properties and defendant was awarded the remaining properties. Both parties agreed that defendant entered the marriage with the Dwight Street and the 2519 Fourth Street properties. The court's opinion does not state that it made a determination whether these properties were defendant's separate assets or part of the marital estate. Although defendant was ultimately awarded these properties, the court included these properties in its property division without such a determination. If the Dwight Street and 2519 Fourth Street properties are considered defendant's separate assets then there must be a determination whether the exceptions of MCL 552.401 permit invasion, which would allow the court to include these properties in the marital estate.

The court failed to make a determination of separate and marital property when it divided the real property, thus remand is necessary for the court to articulate its determinations.

Defendant next argues that the trial court failed to make specific findings regarding the value of the real property, the cars, and plaintiff's pension. We agree. "[A] trial court must first make specific findings regarding the value of the property being awarded in the judgment." *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003). "There are numerous ways in which a trial court can make such a valuation, but the most important point is that the trial court is obligated to make such a valuation if the value is in dispute." *Olson*, *supra*, p 627.

In addition to the marital home, the parties had several rental properties. Plaintiff submitted an appraisal to the court that valued the real properties as follows: 1910 Riverside ($89,000), 2519 Fourth Street ($77,500), 2825 Fifth Street ($65,000), 432 and 434 Cherry Street ($74,000), 2917 and 2919 Fourth Street ($40,000), and 147 Dwight Street ($30,000). Defendant agreed with the appraisals, with the exception of the Dwight Street property. According to defendant, that property was not appraised. If the Dwight Street property is considered defendant's separate property, as discussed, *supra*, and not part of the marital estate, then the court will not need to determine its value. However, since the Dwight Street property was the only property in dispute and it appears that the court considered this marital property, the court should have made a property value determination before it made its property distribution.

The record also fails to show that the court determined the value of plaintiff's pension. Pensions are considered part of the marital estate and may be distributed through a property division upon divorce. MCL 552.18(1); *Magee v Magee*, 218 Mich App 158, 164; 553 NW2d 363 (1996). "Generally, the party seeking to include a pension for distribution in the property settlement bears the burden of proving the reasonably ascertainable value of the pension." *Magee*, *supra*, p 165. The court maintained that it granted defendant the majority of the real property because it granted plaintiff her pension plan free and clear of defendant's interest. However, the record fails to show that the court determined the value of plaintiff's pension. Even though the court gave defendant the opportunity to submit proof that plaintiff had other plans it failed to consider, the court never stated on the record the value it placed on plaintiff's pension when it made its offset. We are thus unable to determine if the court's property distribution was fair and equitable, in light of the offset.

The court also failed to value the parties' motor vehicles. Because the court failed to place a value on the Dwight Street property, plaintiff's pension, and the parties' motor vehicles, we are unable to determine if the court's property distribution was fair and equitable, and a remand is necessary for the court to articulate the requisite findings.

Defendant also argues that the property division was unfair and inequitable because the court failed to consider the best interests of the children when it awarded plaintiff the marital home. As discussed, *supra*, when dividing marital property the court should consider several factors, including the necessities and circumstances of the parties and general principles of equity. *Sparks*, *supra*, p 162. Although defendant argues that it is in the best interest of the children that he be awarded the marital home rather than plaintiff, defendant's argument lacks merit. With the exception of the Dwight Street property, all of the parties' real property is located in Trenton and each of them are within a short distance of one another. During the course of the divorce, plaintiff resided at 2519 Fourth Street and the children visited her at this home during this time. Even if plaintiff were awarded this property in the final property distribution in lieu of the marital home, the children would still have contact with the 2519 Fourth Street property because plaintiff would continue to reside there. Because the parties were required to switch homes, when it comes to the best interests of the children, it is irrelevant which party is granted which home given that the children will be frequenting both homes. For that reason, defendant's claim is without merit.

Defendant also argues that the court failed to recognize the substantial contributions he made to the Riverside home. We are unable to determine on this record what the trial court recognized in this regard, and are unable to address this issue beyond noting that the trial court on remand should articulate reasons for its distribution of real property.

Based on the foregoing, we remand to the trial court to articulate findings regarding defendant's separate property, and to make a finding regarding the value of the Dwight Street property, plaintiff's pension, and the parties' motor vehicles. If division of plaintiff's pension is proper and plaintiff's pension cannot be divided without an eligible domestic relations order (EDRO), then the court should incorporate an EDRO into the judgment of divorce. *Mixon v Mixon*, 237 Mich App 159, 167; 602 NW2d 406 (1999).

Defendant next argues the trial court erred when it failed to award him spousal support. We disagree. Whether to award spousal support is in the trial court's discretion, and on appeal this Court's review is for an abuse of discretion. *Gates*, *supra*, p 432. This Court reviews the trial court's findings of fact concerning spousal support for clear error. *Gates*, *supra*, p 432. "If the trial court's findings are not clearly erroneous, [this Court] must then decide whether the dispositional ruling was fair and equitable in light of the facts." *Gates*, *supra*, p 432.

Spousal support aims "to balance the incomes and needs of the parties in a way that will not impoverish either party." *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003). When considering whether spousal support is appropriate the court should consider the following: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. *Olson*, *supra*, p 631.

Before the court denied defendant's spousal support request, it made several factual findings. The court found that the parties were married for about 12 years and that they equally contributed to the marriage, plaintiff by working and defendant by managing the parties' rental properties. The court found that the parties were about the same age and in good health, and that they both were educated and had the same earning ability. The court further found that defendant was more at fault for the marital strife.

The trial court's factual findings were not erroneous and the trial court's denial of spousal support was proper. The evidence presented showed that plaintiff and defendant are around the same age and they are both gainfully employed. During the marriage defendant was employed with Nationwide Insurance and then Kaplani Insurance as a financial planner. However, in February 2002, while attending a company sponsored training seminar, defendant was hit by a truck and injured his left knee, right hip, and left shoulder. From February 2002, until most recently, defendant was receiving worker's compensation benefits. Although defendant was injured in the past, he maintained his medical restrictions only prohibited him from sitting and driving for "long periods of time." During the course of the divorce, defendant obtained his master's degree and is currently employed as a teacher.

While it is true that plaintiff has been employed as a teacher significantly longer than defendant and she earns about $72,000 yearly, defendant is not precluded from working and earning income comparable to plaintiff. "Spousal support is to be based on what is just and reasonable under the circumstances of the case." *Korth*, *supra*, p 289. Defendant was granted the majority of the rental properties in the divorce. Out of the five properties defendant received in the divorce, four of them are rental properties; this is assuming that defendant intends to keep one of the properties as a primary residence. According to defendant, when the properties are fully rented, he receives about $650 a month in rent for each property. Even after defendant pays off any monthly mortgages or expenses on these properties, the rental properties provide defendant with sufficient additional monthly income. Additionally, plaintiff was ordered to pay defendant $1229 monthly in child support. We conclude that the trial court properly denied defendant's spousal support request.

Defendant next argues that the trial court abused its discretion when it ordered him to exclusively pay for the psychologist and transcript fees and the rental property expenses.

The court ordered that defendant solely pay the evaluation fees of psychologist Dr. Keleman. Shellie Bonnano, a limited license psychologist, issued a psychological recommendation regarding the children. The record indicates that defendant then requested that the court appoint a fully licensed psychologist. However, the order entered for psychological evaluation was by stipulation of the parties, and stated that the parties would share Dr. Keleman's fees on a 50/50 basis. The trial court's subsequent opinion ordered defendant to bear Dr. Keleman's fee in its entirety, without explanation. We conclude that the parties' stipulated order agreeing to share Dr. Keleman's fees 50/50 should control, and reverse the trial court's contrary ruling.

The trial court found that defendant requested the transcripts and, for that reason, he should be responsible for the fees. The court determined that this was fair and equitable. We find no error.

Defendant also requests that plaintiff share in the rental property expenses. Defendant argues that during the course of the divorce he incurred several expenses relating to the rental properties, including water and tax bills, and repair and inspection costs. When the court awarded the various real properties to the parties, the court also ordered that each party be responsible for any back taxes or other liabilities associated with the properties they were granted. Defendant exclusively managed the rental properties throughout the course of the divorce and he received the income from those properties. In light of the circumstances, the court's order was fair and equitable.

Lastly, defendant argues a new trial judge should be assigned to resolve the remaining issues involved in this action. Generally, this Court reviews a motion to disqualify a judge for an abuse of discretion. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). However, because this issue is unpreserved this Court's review is for plain error. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).

Judicial disqualification is proper if a judge cannot impartially hear a case. MCR 2.003(B); *Cain, supra*, p 497. Generally, a trial judge will not be disqualified absent a showing of actual bias or prejudice. *Gates, supra*, p 440. However, "disqualification without a showing of actual bias is warranted in situations where experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerated." *Meagher v Wayne State University*, 222 Mich App 700, 725; 565 NW2d 401 (1997).

Defendant argues that there are several reasons why a new trial judge should be assigned to resolve the remaining issues involved in this action, including that the trial judge went outside of the record to obtain information pertaining to the case. We disagree.

Before trial commenced, the parties reached a settlement agreement. However, the agreement was conditioned upon the dismissal of plaintiff's criminal wiretapping charge against defendant. Plaintiff agreed to dismiss the charge, but when she attempted to do so, Ralph Elizondo, the assistant prosecutor, informed her that she would face an obstruction of justice charge if she did so. The trial court contacted Elizondo to verify that plaintiff was unable to dismiss the case against defendant as she agreed to in the proposed settlement agreement.

Disqualification is warranted if defendant can show bias or prejudice that is both personal and extrajudicial. *Cain, supra*, pp 495-496. "The challenged bias must have its origin in events or source of information gleaned outside the judicial proceeding." *Cain, supra*, pp 495-496. Although the trial judge contacted Elizondo, the court's actions were not personal or improper. The parties reached a conditional agreement and the court inquired into why plaintiff was unable to satisfy the condition of that agreement. The court's inquiry into defendant's criminal charge was for both parties and an attempt to add finality to the case. Defendant has failed to show that the court's contact with Elizondo was personal, improper or prejudicial. *Gates, supra*, p 440.

Defendant further argues that the trial judge was biased against him because the trial judge changed the manner in which the trial was conducted, which prohibited him from testifying. Defendant argues that "the parties were put into an odd kind of trial." Although this is true, defendant consented to the trial court's change. During the middle of trial, after plaintiff testified but before defendant took the stand, the trial court informed the parties that only

documentary evidence would be accepted for the remainder of the trial. The trial started in April 2004 and the court made this decision in December 2004.

Although the court changed the manner in which the trial was conducted, both parties accepted this course of action and it was done for their financial benefit. Defendant approved the change and it appears from the record that the court adopted this change after consultation with both counsel. "An appellant cannot contribute to error by plan or design and then argue error on appeal." *Munson Medical Center*, *supra*, p 388. Defendant has failed to show that the court's decision to change the manner of the trial was evidence of bias or that the change made it impossible for the judge to impartially decide the case. *Cain*, *supra*, p 497.

Defendant also argues that the trial judge made improper remarks during the course of the trial. Specifically, defendant argues that, while discussing the children, the trial judge made the comment "well, it's not May 1st anyway so the new court rule doesn't apply so the court can do anything it wants." It appears that defendant has taken this comment completely out of context. After review of the record, we are unable to determine that the comment was directed to mean that the court "could roam through the children's minds on all issues, not just preference for custody." Although the comment was made while discussing the court's pending interview with the children, nothing in the record suggests that the trial judge lost his impartiality when he made the comment or that he intended to improperly question the children about the divorce. In any event, judicial remarks that are critical or disapproving of, or even hostile to counsel or the parties are ordinarily insufficient to support a bias or partially challenge. *Cain*, *supra*, p 497.

Defendant has failed to prove judicial bias and prejudice. Moreover, defendant has failed to show that the facts of this case "demonstrate an extreme case where the probability of actual bias was too high to be constitutionally tolerated." *Meagher*, *supra*, p 727.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra